

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

<p>Conservation Law Foundation, Inc.</p> <p style="text-align: center;">Plaintiff</p> <p>v.</p> <p>New Hampshire Fish and Game Department, et al.,</p> <p style="text-align: center;">Defendants</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Civil Action No. 1:18-cv-00996-PB</p>
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**STATE’S OBJECTION TO PLAINTIFF’S MOTION TO
EXCLUDE THE OPINION TESTIMONY OF MATTHEW PEHRSON**

On November 27, 2019, Plaintiff filed a Motion to Exclude the Opinion Testimony of Matthew Pehrson (the “Motion”) (Doc. 42). The State hereby objects. For the reasons set forth below, Plaintiff’s motion misconstrues the scope of Mr. Pehrson’s potential opinion testimony, is premature, and should, therefore, be denied.

I. BACKGROUND

On October 4, 2019, the State disclosed Matthew Pehrson as a non-retained expert pursuant to Federal Rule of Civil Procedure 26(a)(2)(B). A copy of the Disclosure is attached to the Motion as Exhibit 1 (Doc. 42-1). Mr. Pehrson is an employee of the New Hampshire Fish and Game Department (“NHFG”) and holds the position of Hatchery Biological Technician. Disclosure at 4 (Doc. 42-1). As stated in the Disclosure, “[g]iven Mr. Pehrson’s position with [NHFG] and experience relevant to this litigation, it is possible that testimony by Mr. Pehrson may constitute opinion testimony.” *Id.* at 1. Moreover, Mr. Pehrson “has not been retained or specially employed as an expert.” *Id.* Thus, pursuant to Fed. R. Civ. Pro. 26(a)(2)(B), Mr. Pehrson was not required to submit an expert report.

II. ARGUMENT

A. CLF Misconstrues the Scope of Mr. Pehrson's Expert Disclosure

In an abundance of caution, the State disclosed Mr. Pehrson as a non-retained expert because the nature of the factual testimony he is expected to offer at trial may include certain technical information related to Mr. Pehrson's work in aquaculture, in the administration of chemicals and medication to maintain fish health at the Hatchery, and in designing a new waste treatment system at the Powder Mill Fish Hatchery (the "Hatchery"). *See* Disclosure at 2 (identifying three areas of potential expert opinion testimony). Specifically, Mr. Pehrson is expected to testify as a fact witness at trial regarding how he performs his aquaculture work at the Hatchery, how formalin and other chemicals are administered to treat fish health, and the origin and design details of the new waste treatment system Mr. Pehrson designed at the Hatchery. Absent a disclosure, the State anticipated that Plaintiff would have sought to exclude Mr. Pehrson from testifying on technical matters.

Pursuant to Federal Rules of Evidence, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise" Fed.R.Evid. 702. Here, Mr. Pehrson's testimony will be technical in nature and will draw on Mr. Pehrson's "knowledge, skill, experience, training or education." *Id.* Accordingly, Mr. Pehrson's primarily fact testimony may stray into expert opinion testimony. In the absence of an expert report,¹ Plaintiff appears to assume that Mr. Pehrson will provide more extensive opinion testimony at trial warranting its

¹ Pursuant to Fed. R. Civ. Pro. 26(a)(2)(B), no expert report is required for non-retained experts. Plaintiff does not dispute Mr. Pehrson's status as a non-retained expert.

motion to exclude.² Yet, the extent of Mr. Pehrson's opinion testimony, if any, will not be known until trial.

B. The Admissibility of Mr. Pehrson's Testimony Should be Determined at Trial

Unlike a retained expert, who provides a specific expert opinion summarized in a written report, the scope of any opinion testimony to be offered by Mr. Pehrson – a non-retained expert – is not yet known. For example, the State disclosed that Mr. Pehrson may testify regarding aquaculture practices at the Hatchery, including use of formalin to treat infection, because Plaintiff asked a series of questions about Mr. Pehrson's aquaculture practices during Mr. Pehrson's deposition. *See, e.g.*, Motion, Ex. 3 at 19-37 (Doc. 42-3). In the event that Plaintiff does not pursue a challenge to the aquaculture methods used at the Hatchery, Mr. Pehrson will have no need to testify on that subject at trial.

In light of not yet knowing the scope of Mr. Pehrson's potential opinion testimony, Plaintiff has not demonstrated a basis for the preemptory exclusion of Mr. Pehrson's testimony before trial. This case is scheduled for a bench trial, where the judge will control both the admissibility of, and the weight given to, any evidence presented. Thus, there is no danger that inadmissible expert opinion will be heard by, and improperly influence, a jury. Indeed, "where the factfinder and the gatekeeper are the same, the court does not err in admitting the evidence subject to the ability later to exclude it or disregard it if it turns out not to meet the standard of reliability established by Rule 702." *Warford v. Industrial Power Systems, Inc.*, 553 F.Supp.2d 28, 31 (D.N.H. 2008) (quoting *In re Salem*, 465 F.3d 767, 777 (7th Cir. 2006)). Plaintiff will be free to object to any opinion testimony by Mr. Pehrson that Plaintiff deems improper, and the

² For example, Plaintiff offers the conjecture that Mr. Pehrson "*may intend* to opine that Defendants' handling of Facility effluent has been 'scientifically appropriate and consistent with professional practices.'" Motion at 7 (emphasis added). The State has not disclosed any such opinion testimony from Mr. Pehrson.

Court will exercise its discretion to either exclude, admit, or conditionally admit the evidence with no prejudice to Plaintiff. Moreover, the State will continue to have the burden to elicit information at trial qualifying Mr. Pehrson to give expert testimony under Rule 702. *Adams v. J. Meyers Builders, Inc.*, 671 F. Supp. 2d 262, 272 (D.N.H. 2009).

Similarly, any relevancy challenge is more appropriately dealt with at trial. Plaintiff challenges the relevance of opinions regarding the Hatchery's fish-rearing practices and the "reasonableness" of formalin practices. Motion at 6-7. The State agrees that such topics may be irrelevant, particularly after the Court rules on the cross motions for summary judgment, but disclosed them based on Plaintiff's own areas of inquiry during discovery. To the extent that Plaintiff does not raise these issues at trial, it may be unnecessary for the State to offer responsive testimony. Thus, the appropriate time to determine relevance, and therefore admissibility, is at trial.

C. Mr. Pehrson is Qualified to Offer Opinion Testimony Based on His Knowledge, Skill, Experience, Training and Education

Plaintiff also challenges Mr. Pehrson's anticipated opinion testimony as "outside his area of expertise, and otherwise unreliable." Motion at 3, 7-11. While much of Plaintiff's argument appears to be based on an incorrect assumption of the scope of Mr. Pehrson's intended opinion testimony, *see, supra* n. 2, Plaintiff also challenges Mr. Pehrson's qualifications to testify about aquaculture practices and the new waste treatment system installed at the Hatchery. Motion at 6, 8-9. The thrust of Mr. Pehrson's testimony will relate to the performance of his job as Hatchery Biological Technician for NHFG. There is no dispute that Mr. Pehrson has relevant experience – he has been managing aquaculture at the State's six fish hatchery's for approximately three years. There is also no dispute that Mr. Pehrson was personally responsible for the design of the new waste treatment system at the Hatchery, and is intimately familiar with both the concept,

design, and operation of the waste treatment system. Motion at 8-9, Ex.3 at 73-76, Ex. 4 at 37-44. As such, Mr. Pehrson has first-hand experience with the subject matter of any potential opinion testimony he may provide at trial. Such experience is adequate to demonstrate reliable expert opinion.

“In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony, without regard to the particular *Daubert* criteria.” *Warford v. Industrial Power Systems, Inc.*, 553 F.Supp.2d 28, 33 (D.N.H. 2008). Indeed, “Rule 702 does not require specific educational training in the area of expertise.” *Id.* at 32 (quoting *Tokio Marine & Fire Ins. Co. v. Grove Mfg. Co.*, 958 F.2d 1169, 1175 (1st Cir. 1992)). Here, Mr. Pehrson’s first-hand knowledge and experience is sufficient to establish the reasonableness and reliability of his potential opinion testimony. Nonetheless, as set out above, the appropriate time to determine admissibility will be at trial if Mr. Pehrson actually offers opinion testimony.

Finally, to the extent Plaintiff suggests that Mr. Pehrson is unqualified to testify regarding the design or functionality of the new waste treatment system because Mr. Pehrson was “unable to say whether his design is feasible to scale up to accommodate the totality of the Facility’s effluent,” Motion at 9, Plaintiff’s argument is nonsensical. The waste treatment system is designed to treat waste, not water, and therefore, the potential to scale it up to handle all water that passes through the Facility is irrelevant. Motion, Ex. 4 at 66-67. Moreover, testing conducted by the New Hampshire Department of Environmental Services, demonstrated that the system was having a significant positive impact on removing phosphorus. Motion, Ex. 4 at 40-44. Plaintiff’s conflation of the amount of cleaning water (a slurry of waste and water collected during the rearing unit cleaning process) directed to the new waste treatment system and the

amount of water that flows through the Hatchery is irrelevant to Mr. Pehrson's knowledge and experience with the functionality of the waste treatment system that he designed.

VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court deny Plaintiff's Motion to Exclude the Opinion Testimony of Matthew Pehrson.

Respectfully submitted,

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By their attorney,

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Date: December 11, 2019

/s/ Christopher G. Aslin

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has this day been forwarded via the Court's
Electronic Case Filing System to:

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